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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20180420
Divide Co. Court No. 12-2016-CV-00042

Ronald Smithberg,	)
	)
Plaintiff and Appellant,	)
	)
vs.	)
	)
Gary Smithberg, James Smithberg and Smithberg Brothers, Inc.,	)
	)
Defendants and Appellees.	)
	)
	)

APPEAL FROM THE DIVIDE COUNTY DISTRICT COURT'S OCTOBER 2, 2018 FINAL *JUDGMENT*, FROM THE *FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT* ORDER DATED OCTOBER 1, 2018, FROM THE *ORDER ON MOTION FOR SUMMARY JUDGMENT* DATED JANUARY 25, 2018 AND FROM THE ORDERS DENYING RECONSIDERATION DATED APRIL 13, 2018 AND OCTOBER 1, 2018.

BRIEF OF APPELLEES GARY SMITHBERG, JAMES SMITHBERG AND SMITHBERG BROTHERS, INC.

Sheldon A. Smith #04062
David J. Smith #06610
Smith Porsborg Schweigert
Armstrong Moldenhauer & Smith
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
Attorneys for Defendants and Appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTUES:

RULES:

STATEMENT OF ISSUES

[¶1] Defendants Gary Smithberg ("Gary"), James Smithberg ("Jim"), and Smithberg Brothers, Inc. (the "Corporation") reject the Statement of Issues presented in the brief of Plaintiff Ronald Smithberg ("Ron"), and contend the legal issues presented for review are as follows:

1. Whether the district court properly granted summary judgment in favor of Gary Smithberg, James Smithberg, and Smithberg Brothers, Inc.

2. Whether the district court properly denied Ron's multiple motions for reconsideration.

3. Whether the district court correctly applied N.D.C.C. § 10-06.1-26 in valuing Ron's minority interest in the Smithberg Brothers, Inc. farm corporation.

STATEMENT OF THE CASE

[¶2] This case is a dispute among shareholders of a closely-held farming corporation based in Divide County. The entity was formed in 1999 as Smithberg Brothers, Inc. under N.D.C.C. § 10-06.1, North Dakota's corporate farming statute. Appellant's Appendix ("App.") at 27; Doc ID# 93, ¶2. The original shareholders were Ron, Gary, Jim, and a fourth brother, Craig Smithberg ("Craig"). Id. At the time of formation, Gary and Craig each owned twenty-six percent (26%) of the Corporation, while Jim and Ron each owned twenty-four percent (24%). App. at 27-28; Doc ID# 93, ¶2. In October 2010, Craig passed away and his wife, Kimberly Smithberg ("Kim"), became the Personal Representative of his estate. App. at 28; Doc ID# 93, ¶2. Following Craig's death, different negotiations occurred between Kim and Ron (on behalf of the Corporation), and later between Kim and Jim (on behalf of himself), to purchase Kim's shares in the Corporation. App. at 28; Doc ID# 93, ¶3. Ultimately, Kim sold her interests to Jim, who became a fifty percent (50%) owner of the Corporation. Id. After the sale of Kim's interests, a dispute between the remaining shareholders peaked, leading to a lawsuit.

The Complaint; Discovery; Summary Judgment

[¶3] On May 24, 2016, Ron executed a kitchen-sink complaint against Gary, Jim, and the Corporation, alleging thirteen separate causes of actions. App. at 9-19; Doc ID# 1. Gary, Jim, and the Corporation answered the complaint on June 29, 2016. App. at 20-26; Doc ID# 6. The parties conducted discovery, including the depositions of Ron, Gary, and Jim in August 2017. See Doc ID# 54-56, 68, 71, 151, and 165. On November 3, 2017, Defendants moved the district court for partial summary judgment. Doc ID# 47-58.

Following oral arguments on December 14, 2017, the district court granted the motion on January 25, 2018. App. at 27-37; Doc ID# 93.

First Appeal

[¶4] On January 29, 2018, shortly after the district court granted partial summary judgment, Ron filed his first Notice of Appeal. Doc ID# 100; see Supreme Court No. 20180042. The sole issue cited in the notice was whether the district court erred in granting the Defendants' motion for summary judgment. Doc ID# 100. The Defendants moved this Court to dismiss the appeal on grounds that the order was interlocutory and the appeal was premature and not authorized by law. See Supreme Court No. 20180042. On February 22, 2018, this Court dismissed Ron's attempted appeal. Doc ID# 103; see Supreme Court No. 20180042.

First Motion for Reconsideration

[¶5] Ron's spurious appeal provided him sufficient time to file his first Motion for Reconsideration on March 20, 2018. Doc ID# 128-32. This motion was an attempt to re-litigate the issues decided on summary judgment. See Doc ID# 130. After additional briefing by the parties, the district court denied the motion with a one-sentence order on April 13, 2018. App. at 38; Doc ID# 140.

Trial; Second Motion for Reconsideration

[¶6] A court trial was held in Williston before Hon. Paul Jacobson on April 19-20, 2018. App. at 39; Doc ID# 252, ¶1. At trial, the sole issue decided was the value of Ron's interest in the Corporation under N.D.C.C. § 10-06.1-26. App. at 41; Doc ID# 252, ¶7. At the conclusion of the trial, the district court permitted the parties to file post-trial briefs. Doc ID# 164. On July 16, 2018, Ron filed his post-trial brief, an awkward combination of a

trial argument and a second motion for reconsideration, circling back, again, on the issues decided by the summary judgment order. Doc ID# 225. On July 18, 2018, Gary, Jim, and the Corporation submitted their post-trial brief, along with proposed findings of fact, as directed by the Court. Doc ID# 230. Notably, Ron did not submit proposed findings despite the Court's direction to do so. The parties simultaneously filed reply briefs on August 8, 2018, and the Defendants also filed a separate response to Ron's second motion to reconsider. Doc ID# 235, 237, and 238.

Findings and Judgment; Second Appeal

[¶7] On October 1, 2018, the district court issued its Findings of Facts, Conclusions of Law, and Order for Judgment. App. at 39-51; Doc ID# 252. The district court also issued a denial of Ron's second motion to reconsider. App. at 52; Doc ID# 255. Ron served his Notice of Appeal on December 3, 2018, outlining seven issues for this Court's consideration. App. at 55-56. Ron served and filed his appellate brief on January 22, 2019. This Court extended briefing deadlines for the Appellees' brief to March 7. It should be noted that no transcripts for any relevant hearings have been provided by Ron, nor are any transcripts contained in the Appendix or the record.

STATEMENT OF FACTS

[¶8] The facts relevant to this appeal revolve around the parties' actions as directors, fiduciaries, and shareholders of the Corporation subsequent to the death of Craig Smithberg. After Craig's passing, Ron began negotiating on behalf of the Corporation for the purchase of Craig's shares from Craig's estate. App. at 28; Doc ID# 93, ¶3. While there was some traction during initial negotiations, no agreement was ever reached. Id. Negotiations broke down over Ron's insistence that certain mineral payments (unrelated

to the Corporation, parties, or the subject matter of this action) be included as a part of the transaction. Id. During these negotiations, Kim, as personal representative of Craig's estate, was represented by attorney Elizabeth Pendlay. Ron led the negotiations on behalf of the Corporation without counsel. Id.

[¶9] Eventually, Craig's estate made a non-negotiable offer, which was left open for a period of thirty days. App. at 40; Doc ID# 252, ¶3. The Corporation never responded to this offer, notwithstanding the requests of Jim and Gary to do so, and the offer expired on May 4, 2013. Id. Ron contends that Kim agreed to sell her shares during these negotiations; however, no purchase agreement was signed, no money exchanged hands, no shares were transferred, and no actions were undertaken by Ron to compel this supposed sale. App. at 45; Doc ID# 252, ¶15.

[¶10] After negotiations with the Corporation fell through, Jim, frustrated with Ron's handling of negotiations, approached Kim and offered to purchase Craig's shares from the estate. App. at 40; Doc ID# 252, ¶3. Jim and Kim reached an agreement on January 22, 2014. Id. Thereafter, Jim owned fifty percent (50%) the Corporation while Gary and Ron owned interests of twenty-six percent (26%) and twenty-four percent (24%), respectively. Id.

[¶11] In May 2012, after Craig's death, but before Jim purchased Craig's shares from the estate, Ron made demands to be bought out of the Corporation. App. at 28; Doc ID# 93, ¶4. Ron's offer to the Corporation was to sell his interest for the sum of $612,000. Id. Ron's offer was to sell his "one-third" of the Corporation, despite only ever owning a twenty-four percent (24%) stake. Id. Even more intriguing, Ron's offer (on behalf of the Corporation) to Craig's estate maxed out at $389,000. Doc ID# 54 at 45:21-46:2. Craig's

estate owned twenty-six percent (26%) of the Corporation, compared to Ron's twenty-four percent (24%), but Ron demanded to be bought out at more than one and one-half times the price he was willing to pay Craig's estate. App. at 40; Doc ID# 252, ¶4. A corporate meeting was held on December 22, 2014, at which time the Corporation formally rejected Ron's offer. Id. The meeting was properly noticed; however, Ron elected not to attend. Id. Despite an absence of evidence, Ron maintains the Corporation agreed to purchase his shares for $612,000. Appellant's Br., ¶67.

[¶12] Ron ceased to be involved in the operations of the Corporation in May 2012. App. at 44; Doc ID# 252, ¶14. Ron claims he was improperly removed as a director of the Corporation in violation of the corporate bylaws, despite not being actively engaged in the operation of the farm or Corporation. Appellant's Br., ¶18.

[¶13] More than seventeen months later, Ron commenced the underlying action on June 10, 2016. See App. at 40; Doc ID# 252, ¶5. In his complaint, Ron alleged a host of allegations against the Defendants concerning the operation of the Corporation and treatment of Ron in his capacity as a minority shareholder, director, and officer of the Corporation. Id. On January 25, 2018, the district court granted Defendants' motion for summary judgment, specifically limiting Ron's claims to a buyout by the Corporation at a value based upon N.D.C.C. § 10-06.1-26. Id. Therefore, the only issue to proceed to trial was the valuation of Ron's twenty-four percent (24%) interest in the Corporation.

[¶14] A two-day bench trial began on April 19, 2018, where each side presented numerous exhibits and multiple witnesses as evidence regarding the valuation of the Corporation. Ron argued his interest in the Corporation was worth more than $435,000 as of December 31, 2011. App. at 41; Doc ID# 252, ¶6. Defendants argued Ron's 24%

interest was worth $146,771, as of December 22, 2017 or, alternatively, $169,985, as of June 10, 2016, the date the action was commenced. Id. During the trial, the district court liberally accepted evidence from Ron, regardless of whether it was relevant to the sole issue remaining. The district court informed counsel that the weight and credibility of such evidence would be considered after the trial.

[¶15] Ron's valuation is based upon testimony by Ron's expert witness, Shawn Stumphf, who admitted at trial that he was unaware of and did not include in his report the requirements of N.D.C.C. § 10-06.1-26. App. at 47; Doc ID# 252, ¶21. Conversely, Defendants presented competent, admissible evidence establishing a valuation of the Corporation through their expert witness, Tom Ault, as required by N.D.C.C. § 10-06.1-26. App. at 47; Doc ID# 252, ¶24. Accordingly, the district court was left with only two admissible valuations, both provided by Defendants. The district court elected to value Ron's interest in the Corporation at $169,985 as of June 10, 2016. App. at 50; Doc ID# 252, ¶29.

LAW AND ARGUMENT

A. The district court's grant of summary judgment should be affirmed.

[¶16] The central issue of this appeal is the district court's grant of summary judgment on Ron's myriad causes of action identified in his complaint. Defendants contend the district court properly granted summary judgment and proceeded to trial on the sole remaining issue: the value of Ron's interest in the Corporation.

1. Standard of Review.

[¶17] The North Dakota Supreme Court has a clear standard of review regarding a district court's grant of summary judgment:

> [Summary judgment] is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Maragos v. Newfield Production Company, 2017 ND 191, ¶7, 900 N.W.2d 44 (citations omitted). Accordingly, the January 25, 2018 order granting partial summary judgment shall be reviewed de novo.

2. Summary judgment was properly granted on the basis that Ron failed to identify with specificity material facts precluding summary judgment.

[¶18] A defendant may base a motion for summary judgment on the absence of evidence in support of a plaintiff's claim. See Rooks v. Robb, 2015 ND 274, ¶11, 871 N.W.2d 468.

> A party resisting a [properly supported] motion for summary judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations, but must set forth specific facts by presenting competent, admissible evidence, whether by affidavit or by directing the court to relevant evidence in the record, demonstrating a genuine issue of material fact. [T]he court has no duty to scour the record for evidence that would preclude summary judgment. The party opposing the motion has the responsibility to draw the court's attention to evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising a material factual issue or from which the court may draw an inference creating

> a material factual issue. The party opposing summary judgment must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief.

Yahna v. Altru Health Systems, 2015 ND 275, ¶6, 871 N.W.2d 580 (citations omitted). This Court has recognized "'[m]ere speculation is not enough to defeat a motion for summary judgment,' and '[i]f no pertinent evidence on an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed that no such evidence exists.'" Id. at ¶7 (citing Investors Real Estate Trust Props., Inc. v. Terra Pac. Midwest, Inc., 2004 ND 167, ¶5, 686 N.W.2d 140).

[¶19] The basis of the Defendants' motion was that Ron could not produce competent, admissible evidence to support each element of any claim contained within his complaint. Defendants conceded that Ron was nevertheless entitled to relief for a minority shareholder under N.D.C.C. § 10-06.1, North Dakota's corporate farming act. Each of Ron's thirteen causes of action were addressed in the Defendant's motion for summary judgment and each is analyzed below.

a. Count One: Breach of Fiduciary Duties.

[¶20] In Count One of his complaint, Ron asserted Gary and Jim breached obligations under N.D.C.C. § 10-19.1-50; 10-19.1-51; and 10-19.1-60. App. at 14; Doc ID# 1, ¶¶37-42. Chapter 10-19.1 is the North Dakota Business Corporation Act, and the above subsections identify the standards of conduct for directors, director conflicts of interest, and standards of conduct for officers, respectively. "Shareholders of close corporations owe one another a duty of utmost loyalty and good faith." Kortum v. Johnson, 2008 ND 154, ¶27, 755 N.W.2d 432. "This duty arises because of the nature and characteristics of

close corporations and the potential for 'freeze outs' of non-controlling close corporation shareholders." Id. at ¶28. However, "[c]ontrolling shareholders do not breach their fiduciary duty if they demonstrate a legitimate business purpose for their action." Id. at ¶38.

[¶21] Ron has failed to identify the specific acts that constitute a breach of the duties identified in the above statutes. Ron has similarly failed to identify or quantify money damages due to any purported breach. Ron addresses this cause of action in his brief opposing summary judgment beginning at paragraph 148. See Doc ID# 69. After a lengthy block quote, Ron discusses his responses to written discovery and attempts to recharacterize the motion for summary judgment as a motion to dismiss under N.D.R.Civ.P 12 (which is was not). Id. at ¶¶150-54. Ron then relists the allegations contained in his complaint (which is insufficient to survive summary judgment). Id. at ¶155-65. Ron does not "set forth specific facts by presenting competent, admissible evidence, whether by affidavit or by directing the court to relevant evidence in the record, demonstrating a genuine issue of material fact," as required by law. See Yahna at ¶6. Instead, Ron merely relies on his complaint and unsupported conclusion allegations. See Doc ID# 69, ¶¶150-65. Ron also fails to identify damages that are recoverable for a breach of fiduciary duty. See id. at ¶166.

[¶22] "If no pertinent evidence on an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed that no such evidence exists." Yahna at ¶7. "The party opposing the motion has the responsibility to draw the court's attention to evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising a material factual issue or

from which the court may draw an inference creating a material factual issue." Id. at ¶6. Ron shirked this responsibility and as a result the district court granted summary judgment on this issue. App. at 30-31; Doc ID# 93, ¶¶7-8. This Court is under no obligation to "scour the record" for the same information and therefore the district court's grant of summary judgment on this count should be affirmed.

b. Count Two: Oppression.

[¶23] Count Two of Ron's complaint alleges that Ron suffered damages due to "oppressive conduct" by Gary and Jim. App. at 15; Doc ID# 1, ¶¶43-45. "[U]nder the provisions of [North Dakota's] revised Business Corporation Act, the term 'oppressive' conduct has been removed from the involuntary dissolution statute as a basis for relief and replaced with the term 'unfairly prejudicial.'" Balvik v. Sylvester, 411 N.W.2d 383, 388, n. 3 (N.D. 1987). As indicated by the preceding quotation, "oppression" was previously included in the involuntary dissolution statute, now N.D.C.C. § 10-19.1-115. Therefore, "oppression" has not been in use in the text of North Dakota's Corporation Act since 1987 and, even then, only existed as a reason to grant corporate dissolution. Nevertheless, Ron failed to identify any "oppressive" conduct and failed to identify damages flowing therefrom. As such, the district court's grant of summary judgment on this issue should be affirmed. See Doc ID# 69, ¶¶173-78.

c. Count Three: Accounting.

[¶24] Defendants argue that Count Three: Accounting, is not a specific cause of action; rather it is a remedy that was requested by Ron. In his brief in response to summary judgment, Ron appears to concede an accounting is in fact an equitable remedy; however, Ron fails to identify any controlling authority that permits an accounting in this instance. Nor does he lead the district court to facts (by affidavit or elsewhere in the record) that

establish such an accounting is warranted. See Doc ID# 69, ¶¶167-72. Defendants assert that summary judgment should also be affirmed on Count Three: Accounting.

d. Count Four: Derivative Claims; Count Five: Direct Claims; Count Six: Removal of Directors; Count Seven: Illegal Distributions; Count Nine: Dissenting Shareholder Rights; Count Twelve: Conversion; and Count Thirteen: Deceit/Fraud.

[¶25] It appears to Defendants that Ron abandons all hope for Counts Four, Five, Six, Seven, Nine, Twelve, and Thirteen. Ron addresses these causes of action at ¶189 of his summary judgment response. See Doc ID# 69. This subsection is a jumble of "unsupported, conclusory allegations" and an utter failure by Ron to "draw the court's attention to evidence in the record," affidavit, or otherwise, that is required to resist summary judgment. See Yahna at ¶6. Ron claims the existence of "substantial evidence supporting Ron's claim, much of it coming from Defendants' own testimony." Doc ID# 69, ¶189. At the time of summary judgment, Ron, Gary, and Jim had all been deposed. See Doc ID# 54-56. Clearly, Ron had the ability to cite to the line and page numbers from Gary and Jim's deposition transcripts in an effort to identify facts supporting these claims. Ron either chose not to, or he is implicitly admitting there is no competent evidence in support of these causes of action. Under either avenue, the district court properly granted summary judgment on these counts and this Court should affirm the same.

e. Count Eight: Corporate Dissolution.

[¶26] Ron's eighth cause of action is for corporation dissolution under N.D.C.C. § 10-19.1-105. App. at 17; Doc ID# 1, ¶¶57-58. In his complaint, Ron specifically requests enforcement of his "buy-out" with interest and other monies. Id. The relief sought by Ron is essentially remuneration for his shares in the farming corporation. Section 10-06.1-26

provides the district court with the appropriate mechanism to value Ron's minority interest and compensate him for the same.

> If a shareholder owns less than fifty percent of the shares of a farming …corporation…, and if the terms and conditions for the repurchase of those shares … are not set forth in the bylaws … or are not the subject of a shareholders' agreement … then the disposition of such shares ***must*** be determined by this section upon the withdrawal of the shareholder.

Id. (emphasis added). Section 10-06.1-26 provides for the procedure for dissenting shareholders to follow, requiring the shareholder to offer to sell the shares to the remaining shareholders. Id. If the shareholders do not wish to purchase the shares, the corporation may do so. Id. If the corporation does not purchase the shares, the dissenting shareholder may sell to another eligible individual. Id. If that does not occur, the withdrawing shareholder may bring an action to dissolve the corporation. Id.

[¶27] Here, neither the remaining shareholders (Gary and Jim), nor the Corporation desired to purchase Ron's shares at the outlandish price he demanded. In this instance, Section 10-06.1-26 also provides a mechanism for the dissolution or purchase of Ron's shares, directing the corporation or its remaining shareholders (on a pro rata basis) to purchase the withdrawing shareholder's interests at a court-determined price within twelve (12) months, or else the corporation shall be dissolved. This is the procedure that the district court followed at the subsequent trial. App. at 50-51; Doc ID# 252, ¶30.

f. Count Ten: Unjust Enrichment.

[¶28] In resisting Defendants' motion for summary judgment, Ron addresses Count Ten: Unjust Enrichment at ¶¶179-181 of his brief. See Doc ID# 69. "Unjust enrichment is an equitable doctrine based upon a quasi or constructive contract implied by law to prevent a person from being unjustly enriched at the expense of another." Ritter, Laber and

Associates, Inc. v. Koch Oil, Inc., 2004 ND 117, ¶26, 680 N.W.2d 634. Unjust enrichment applies "in the absence of an expressed or implied in fact contract." Id. "Unjust enrichment requires: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) an absence of justification for the enrichment and impoverishment; and (5) an absence of remedy provided by law." Id.

[¶29] Here, as with all other causes of action, Defendants based their summary judgment motion on the dearth of facts in the record. See Doc ID# 48, ¶¶38-40. In his brief, Ron fails to identify any enrichment of Gary and/or Jim, or precisely how Ron was impoverished. See Doc ID# 69, ¶¶179-81. Ron focuses on Gary and Jim's corporate credit use, but ignores the justification of the same. Id. No specific amounts are identified. Id. Moreover, Ron again fails to point the district court to specific facts in an affidavit or otherwise in the record that establish each and every element of unjust enrichment. Id. Again, the district court, left in the dark, granted summary judgment on this claim. Defendants request this Court affirms. App. at 35; Doc ID# 93, ¶18.

g. Count Eleven: Breach of Contract.

[¶30] Regarding Count Eleven: Breach of Contract, Ron reverted to relying on the allegations of his complaint, filling space with a large block quote from the complaint that is insufficient to resist summary judgment. Doc ID# 69, ¶¶182-83. "The elements of a prima facie case for breach of contract are: (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach." Bakke v. Magi-Touch Carpet One Floor & Home, Inc., 2018 ND 273, ¶13, 920 N.W.2d 726. "To create an enforceable contract, there must be a mutual intent to create a legal obligation." Matter of Estate of Harris, 2017 ND 35, ¶8, 890 N.W.2d 561.

[¶31] Continuing along the same theme, Ron failed to show evidence in the record establishing a contract. Doc ID# 69, ¶182-83. Our assumption is that Ron is referring to a contract to buy-out his interests in the Corporation; however, even examining the evidence in the light most favorable to Ron, there is no competent admissible evidence in the record that shows a mutual intent to create a legal obligation between Ron and the other shareholders, or the Corporation. Additionally, there is no evidence in the record establishing a breach of the phantom contract or any damages resulting therefrom. The district court's grant of summary judgment on this issue should also be affirmed. See App. at 35; Doc ID# 93, ¶18.

B. The district court's orders denying reconsideration of summary judgment should be affirmed.

[¶32] Following this Court's dismissal of his first appeal, Ron filed a Motion to Reconsider on March 20, 2018. Doc ID# 129. Within this motion, supported by a 45-page brief -- but no new affidavits or exhibits -- Ron requested the district court reconsider its grant of summary judgment in favor of the Defendants. Doc ID# 129-130. The district court issued a one-page order denying reconsideration on April 13, 2018. App. at 36; Doc ID# 140. Not to be dissuaded, Ron again raised his request for reconsideration as part and parcel of his post-trial brief, filed with district court on July 16, 2018. Doc ID# 225-226. The district court again denied reconsideration by an order dated October 1, 2018. App. at 52; Doc ID# 255. Ron has identified the district court's refusal to grant his motions for reconsideration as preliminary issue number 7 in his Notice of Appeal, and discussed the same at various times throughout his appellate brief. App. at 56.

[¶33] The North Dakota Supreme Court recently restated the current law for motions to reconsider in Kautzman v. Doll, 2018 ND 23, 905 N.W.2d 744. "North Dakota law does

not formally recognize motions to reconsider." Kautzman, at ¶9 (citations omitted). Such motions are treated "as either motions to alter or amend a judgment under N.D.R.Civ.P. 59(j), or as motions for relief from a judgment or order under N.D.R.Civ.P. 60(b)." Id. (citations omitted). Ron identifies N.D.R.Civ.P. 59(j) and N.D.R.Civ.P. 60(b) as authorities for both motions; however, Ron fails to provide any legal analysis under the relevant case law related to either rule. In fact, Ron never really addresses his arguments regarding reconsideration. Rather, Ron only vaguely states reconsideration is warranted. Appellants Br. at ¶32-34. This is undoubtedly because Ron remains unable to meet the legal standard under either rule.

1. Standard of Review.

[¶34] "A district court's denial of a motion for reconsideration will not be reversed on appeal absent a manifest abuse of discretion." Kautzman, 2018 ND 23, ¶13, 905 N.W.2d 744 (citations omitted). "A court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination." Id. Despite the district court's concise orders denying each motion, the arguments presented by the Defendants in resisting the motions clearly establish Ron's legal shortcomings.

2. Motions to Reconsider under N.D.R.Civ.P. 59(j).

a. Both Motions to Reconsider were untimely.

[¶35] A motion under N.D.R.Civ.P. 59(j), "must be served and filed no later than 28 days" after entry of the order. N.D.R.Civ.P. 59(j). When considered under Rule 59(j), the time limit for filing a motion to reconsider begins to run when the moving party has "actual knowledge of entry of [an] order … clearly evidenced in the record." Austin v. Towne,

1997 ND 59, ¶11, 560 N.W.2d 895. "A trial court does not abuse its discretion by denying a N.D.R.Civ.P. 59(j) motion if the motion was not timely." Id. at ¶9.

[¶36] Here, the district court entered its Order granting Defendants' motion for summary judgment on January 25, 2018. App at 27-37; Doc ID# 93. Ron filed his first notice of appeal on January 29, 2018, four days later. Doc ID# 100. This improper appeal was dismissed on February 21, 2018. Doc ID# 103. Ron filed his motion for reconsideration twenty-seven (27) days later on March 20, 2018. Doc ID# 128. Even when tolling the duration of the improper appeal, the first motion for reconsideration was filed thirty-one (31) days after the order granting summary judgment was issued. Ron's subsequent motion for reconsideration was not filed until July 17, 2018. Doc ID# 225-226. Accordingly, both of Ron's motions, if brought under N.D.R.Civ.P. 59(j), were untimely and the district court would not have abused its discretion in denying either.

b. Both Motions to Reconsider request the district court reinterpret evidence.

[¶37] "A Rule 59(j) motion should not be used as a means for the trial court to reconsider evidence already presented but rather as a means to correct errors of law." Fonder v. Fonder, 2012 ND 228, ¶10, 823 N.W.2d 504; see also Hanson v. Hanson, 2003 ND 20, ¶5, 656 N.W.2d 656. Particularly important in this case, when hearing a Rule 59(j) motion, the Court does not "abuse its discretion by declining to entertain a new interpretation of the evidence raised after summary judgment." Ellingson v. Knudson, 498 N.W.2d 814, 818 (N.D. 1993). As argued above, the district court did not err as a matter of law in granting summary judgment. Ron wholly failed to meet his burden in opposing Defendants' summary judgment motion. The vast majority of Ron's first reconsideration motion is essentially an appeal to the district court to reinterpret evidence readily available, but not

properly raised in response to summary judgment. See Doc ID# 130. Ron dedicates a substantial portion of his post-trial brief again reasserting issues disposed of on summary judgment. See Doc ID# 225. Rule 59(j) does not provide an avenue for Ron's attempt to relitigate issues decided on summary judgment. The district court would not have abused its discretion in denying the motions on these bases.

3. Motions to Reconsider under N.D.R.Civ.P. 60(b).

a. Ron's motions are made under N.D.R.Civ.P. 60(b)(6)'s "catch-all" provision.

[¶38] N.D.R.Civ.P. 60(b) identifies six reasons upon which a party may seek relief from judgment or order:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Ron's failure to identify which provisions of Rule 60(b) are applicable leaves us the chore to guess. Ron's motions to reconsider do not allege "mistake, inadvertence, surprise, or excusable neglect" by the district court; Ron offers no new evidence that could not have been discovered beforehand; Ron does not argue fraud, misrepresentation, or misconduct

by the Defendants[1]; Ron does not argue the judgment is void; and Ron does not indicate the judgment has been otherwise satisfied, released or discharged. Accordingly, subsections (1) through (5) are inapplicable, leaving only subsections (6) for review.

[¶39] In considering N.D.R.Civ.P. 60(b)(6), the North Dakota Supreme Court has stated:

> Rule 60(b)(6), N.D.R.Civ.P., is a 'catch-all' provision that allows a district court to grant relief from a judgment for any other reason that justifies relief. Rule 60(b)(6), N.D.R.Civ.P., should be invoked only when extraordinary circumstances are present.
>
> …
>
> [T]he use of the rule is limited by many considerations. It is not to be used as a substitute for appeal. It is not to be used to relieve a party from free, calculated, and deliberate choices he has made. It is not to be used in cases where subdivisions (1) to (5) of Rule 60(b) might be employed—it and they are mutually exclusive. Yet 60(b)(6) can be used where the grounds for vacating a judgment or order are within any of subdivisions (1) to (5), but something more or extraordinary which justifies relief from the operation of the judgment must be present.

Kautzman, 2018 ND 23, ¶14, 905 N.W.2d 744 (citations and quotations omitted). "The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment, and relief should be granted only in exceptional circumstances." Id. (citations omitted).

2. Ron's motions are unexceptional and were designed to circumvent the appellate process.

[¶40] As stated above, the majority of Ron's motions to reconsider devote substantial wordcount to rearguing causes of action that were dismissed by the district court's

[1] Ron does allege fraud in his abundant complaint; however, Rule 60(b)(3) applies where "an adverse party obtained the judgment through fraud, misrepresentation, or misconduct." Dvorak v. Dvorak, 2001 ND 178, ¶ 10, 635 N.W.2d 135. Ron has not argued that the judgment was procured by fraud, misrepresentation, or misconduct.

summary judgment order. Ron wholly failed to meet his obligations in opposing summary judgment and the district court was left without factual support for each element of each cause of action. See Yahna v. Altru Health Sys., 2015 ND 275, ¶6, 871 N.W.2d 580; see also Rooks v. Robb, 2015 ND 174, ¶11, 871 N.W.2d 468 (a defendant may base a motion for summary judgment on the absence of evidence in support of a plaintiff's claim). Both motions to reconsider attempt to address this shortcoming by asking for a second bite at the apple; however, the law governing motions to reconsider under N.D.R.Civ.P. 60(b) clearly states that they are no substitute for an appeal. Ron's motions for reconsideration to do not relieve him from the "free, calculated, and deliberate choices he has made" in presenting his opposition to summary judgment. "[This] kind of afterthought, or shifting of ground, is not one of the circumstances in which a motion for reconsideration is appropriate." Motschman v. Bridgepoint Mineral Acquisition Fund, LLC, 2011 ND 46, ¶10, 795 N.W.2d 327.

C. The district court correctly applied N.D.C.C. § 10-06.1-26 in valuing Ron's minority interest in the Smithberg Brothers, Inc. farm corporation.

[¶41] The sole issue tried to the district court was a determination of the value of Ron's interest in the Corporation under N.D.C.C. § 10-06.1-26. App. at 41; Doc ID# 252, ¶7. Under this statute, a fair price "must be determined as though the shares were being valued for federal gift tax purposes under the Internal Revenue Code." N.D.C.C. § 10-06.1-26. At trial, Ron argued his interest in the Corporation was worth more than $435,000 as of December 31, 2011. App. at 41; Doc ID# 252, ¶6. Defendants argued Ron's 24% interest was worth $146,771 as of December 22, 2017 or, alternatively, $169,985 as of June 10, 2016, the date the action was commenced. Id.

1. Standard of Review

[¶42] "Statutory interpretation is a question of law, fully reviewable on appeal." Teigen v. State, 2008 ND 88, ¶19, 749 N.W.2d 505 (citations and quotations omitted). "The primary purpose of statutory interpretation is to determine legislative intent." Id. "Statutes are construed as a whole and are harmonized to give meaning to related provisions." Id.

2. The evidence presented by Ron is neither relevant nor reliable to a valuation of his 24% interest under N.D.C.C. § 10-06.1-26.

[¶43] Defendants contend the evidence supporting Ron's valuation is irrelevant, unreliable, and was properly disregarded by the district court. First, there is no equitable basis for the Court to accept a valuation date of December 31, 2011. Second, Ron's expert admitted he did not value Ron's share for federal gift tax purposes as required by N.D.C.C. § 10-06.1-26. Finally, Ron's expert made multiple, significant errors in calculating the value of Ron's share of the Corporation.

a. There is no basis for the court to accept a valuation date of December 31, 2011.

[¶44] While farming corporations are generally governed under Chapter 10-06.1, N.D.C.C., the corporate farming laws specify that the provisions of Chapter 10-19.1 will control where Chapter 10-06.1 is silent. See N.D.C.C. § 10-06.1-13. Chapter 10-06.1 is silent as to the date of valuation regarding a proceeding under N.D.C.C. § 10-06.1-26. However, Chapter 10-19.1 does provide guidance on the issue: when the court directs a sale of all of a shareholder's shares in a corporation, the valuation must be based on the date of commencement of the action or another date as equity requires. N.D.C.C. § 10-19.1-115(4)(a).

[¶45] Equity does not call for a valuation date of December 31, 2011, as Ron requested. Ron sat on his right to pursue a valuation under N.D.C.C. § 10-06.1-26 and opted to

"negotiate" with Gary and Jim. App. at 43; Doc ID# 252, ¶12. In 2012, the Corporation was lucrative and operating successfully as commodity prices were high and the Corporation received a significant sum from prevented planting crop insurance as a result of abnormally wet conditions in 2011. Id. Ron waited four years to commence litigation. Id. During those four years, Ron continually demanded the Corporation purchase an additional 8.7% that Ron did not own. Id. Further, Ron demanded the Corporation account for certain monies he allegedly saved the Corporation in negotiations for the purchase of shares held by Craig's Estate. Id.; see Doc ID# 169. Notably, under Ron's leadership the Corporation failed to timely accept the Estate's offer. Id.; see Doc ID# 220.

[¶46] Since the action was commenced, commodities prices and production have been low, seed and chemical costs have been high, and equipment values have continually depreciated. App. at 43; Doc ID# 252, ¶13. Forcing the Corporation to purchase Ron's shares at their 2012 value would be inequitable. Id. The district court recognized that Ron's demand of a valuation date of December 31, 2011, was inequitable and would put the Corporation at a significant disadvantage that was not in place in early 2012. App. at 44; Doc ID# 252, ¶13.

[¶47] Additionally, Ron failed to demonstrate an equitable position for a valuation date of December 31, 2011. App. at 44; Doc ID# 252, ¶14. Instead, the evidence shows that Ron voluntarily walked away from the Corporation and demanded a buyout in May 2012. Id. After that date, he did nothing for the benefit of the corporation, yet his demand included 1/3 of the outstanding shares of Corporation. Id. Ron argued a valuation of December 31, 2011 is equitable because the Corporation allegedly agreed to his proposed buyout date, but he was unable to produce any evidence of an agreement, either written or

verbal, between himself and the corporation at trial. App. at 45; Doc ID# 252, ¶15. Instead, the district court noted that Ron's own testimony indicated negotiations for the purchase of his shares continued well into 2014. App. at 45; Doc ID# 255, ¶16. Notably, "[i]t is a general rule of law that silence and inaction, or mere silence or failure to reject an offer when it is made, do not constitute an acceptance of the offer." B.J. Kadrmas, Inc. v. Oxbow Energy, LLC, 2007 ND 12, ¶13, 727 N.W.2d 270 (citations omitted). Accordingly, because Ron could not produce any evidence of an accepted buyout proposal, Ron's arguments that there was an agreement are meritless, and the district court properly rejected Ron's valuation date of December 31, 2011, while accepting the valuation of Ron's interest as of June 10, 2016, the date the action was commenced.

b. Ron's expert's testimony and report are neither reliable nor relevant.

[¶48] The North Dakota Rules of Evidence govern the testimony of an expert witness:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or **to determine a fact in issue**.

N.D.R.Ev. 702 (emphasis added). Additionally, evidence must be relevant. "Evidence is relevant if[] it has any tendency to make a fact more or less probable than it would be without the evidence[] **and the fact is of consequence in determining the action**. N.D.R.Ev. 401 (emphasis added). Again, the only fact in issue at trial was the value of Ron's shares of the Corporation as though valued for federal gift tax purposes under the Internal Revenue Code. App. at 46; Doc ID# 252, ¶19; see N.D.C.C. § 10-06.1-26.

[¶49] Shawn Stumphf, Ron's expert witness, testified via telephone on April 19, 2018. App. at 47; Doc ID# 252, ¶20. Prior to trial, Ron submitted a series of documents from

Stumphf including: (1) a report dated January 22, 2018, valuing 32.7% of stockholders' equity in Smithberg Brothers as of December 31, 2011 at $593,000 (Doc ID# 212); and (2) a subsequent modification thereof dated March 9, 2018, valuing 24% of stockholders' equity in Smithberg Brothers at $435,000 (Doc ID# 213). However, the district court found Stumphf's testimony and report to be unreliable and irrelevant for several reasons. Id.

[¶50] Most importantly, Stumphf admitted he did not value Ron's 24% interest as though for federal gift tax purposes under the Internal Revenue Code as mandated by N.D.C.C. § 10-06.1-26. App. at 47; Doc ID# 252, ¶21. The court noted Stumphf does not prepare tax returns or gift tax returns. Id. Instead, the court found Stumphf attempted to find "fair value" without considering the mandate of N.D.C.C. § 10-06.1-26. Id.

[¶51] Finally, the court found Stumphf made multiple significant errors in valuing Ron's 24% interest. App. at 47; Doc ID# 252, ¶22. In his March 9, 2018 amendment whereby Stumphf valued Ron's 24% interest, Stumphf failed to adjust his valuation to account for a significant debt that assumed the corporation purchased Craig's Estate's shares. Id. Additionally, Stumphf did not consider the possibility of applying a minority discount to Ron's shares despite testifying it being common practice in gift tax returns. Further, Stumphf, in comparing his estimates with other stock sales, considered Jim's purchase of the Estate's shares to be as of December 31, 2010 despite the sale not occurring until January 22, 2014. Id.

[¶52] Although Stumphf may have experience in valuing business entities and numerous certifications through various organizations, the court reasoned Ron was left with an expert who did not follow the law and provide a valuation as though the shares were being valued for federal gift tax purposes as required. App. at 48; Doc ID# 252, ¶23. While Stumphf's

testimony and report may have assisted the district court in understanding the evidence presented, they certainly did not assist the district court in determining the value required by N.D.C.C. § 10-06.1-26. Id. Stumphf's testimony and expert report were neither relevant, nor reliable under N.D.R.Ev. 401 or 702, and were properly disregarded by the district court.

3. Defendants' Evidence is reliable and relevant to a valuation of Ron's 24% interest under N.D.C.C. § 10-06.1-26.

[¶53] Where Ron's evidence and testimony were lacking, Defendants presented reliable and relevant evidence of a fair value for Ron's 24% interest consistent with North Dakota law. In fact, the only guidance for the district court to consider for the valuation of Ron's 24% was presented by Defendants through their expert witness, Thomas Ault.

[¶54] During his testimony at trial, Ault explained that he has been a Certified Public Accountant since 1991. App. at 48; Doc ID# 252, ¶25. Ault stated he was experienced in creating federal gift tax returns. Id. While Ault explained the effective date of his report was December 22, 2017, he was aware the valuation date could change. Id. Accordingly, Ault made his report so that it could be easily amended by the district court should it so choose. Id.

[¶55] More importantly, Ault's report was prepared specifically as though Ron's shares were being valued for federal gift tax purposes as required. App. at 49; Doc ID# 252, ¶26; see Doc ID# 215. Additionally, the district court noted Ault thoroughly explained his reasonings and assumptions in calculating the value of Ron's shares as though being valued for federal gift tax purposes. Id. Ault explained that an asset approach as though liquidated was the appropriate method of valuation for Corporation rather than an income or market approach. Id. To arrive at the value of the Corporation utilizing the asset approach, Ault

began with the most recent equipment appraisal by Butch Haugland, dated October 2, 2016. Id.; see Doc ID# 187. The appraisal indicated a total value of Smithberg Brothers' assets of $1,279,000. Doc ID# 187.

[¶56] Next, Ault reduced the value of the Corporation's assets by 15% for an estimated depreciation since the date of the equipment appraisal to December 22, 2017, the date of the report. App. at 49; Doc ID# 252, ¶26; Doc ID# 215. After estimating the depreciation of assets, Ault arrived at a value of $1,087,000. Id. Subsequently, Ault estimated a selling cost of 10% to the assets in a liquidation scenario. Id. Importantly, Ault explained gift tax returns should consider liquidation costs if there is a reasonable likelihood that the assets could be liquidated. Id. Further, Ault testified that due to the significant family disharmony it is reasonable that Smithberg Brothers would be subject to a liquidation scenario. Id.

[¶57] Additionally, since the Corporation's assets were largely depreciated out, Ault took into account $163,000 in taxes due on the estimated tax basis of $330,000 leaving a net of $815,000 after liquidation. App. at 49; Doc ID# 252, ¶27; Doc ID# 215. Thereafter, Ault found for Ron's 24% interest in Smithberg Brothers and considered a 25% minority discount due to lack of marketability and control. Id. Ault testified that a 25% minority discount is commonly used in preparing gift tax returns and the IRS routinely accepts a 25% minority discount. Id. Further, Ault explained that minority discounts are necessary to finding an accurate value of Ron's 24% interest. Id. Ultimately, Ault's report concludes the value of Ron's 24% interest in the corporation as of December 22, 2017 was **$146,771**. See Doc ID# 215.

[¶58] Additionally, Ault considered the value of the Corporation as of June 10, 2016, the date this action was commenced. App. at 50; Doc ID# 252, ¶28; Doc ID# 223. To find that

value, Mr. Ault simply removed the estimated depreciation from Butch Haugland's October 2, 2016 equipment appraisal and recalculated to arrive at a value of **$169,985**. Id. Ultimately, the district court accepted Mr. Ault's methodology and elected to use the date of June 10, 2016, the date this action was commenced. App. at 50; Doc ID# 252, ¶29.

CONCLUSION

[¶59] As discussed above, the district court correctly determined the issues on appeal. Appellees respectfully request this Court to affirm the decisions of the district court.

Dated: March 7, 2019.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By: */s/ Sheldon A. Smith*
Sheldon A. Smith #04062
David J. Smith #06610
Attorneys for Defendants and Appellees

CERTIFICATE OF SERVICE

[¶60] I hereby certify that a true and correct copy of the foregoing brief was filed electronically with the Clerk of the North Dakota Supreme Court on the 7th day of March, 2019 and e-mailed to **Joel M. Fremstad** (joel@fremstadlaw.com).

Dated: March 7, 2019.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By: */s/ Sheldon A. Smith*
Sheldon A. Smith #04062
David J. Smith #06610
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
Attorneys for Defendants and Appellees